APPENDIX

Reproduction of Cover Page and
Pages 36 to 42 of the

BRIEF OF THE APPELLEES AS TAX COLLECTING OFFICERS OF THE STATE OF NEW JERSEY

in

Edwin C. Nevin, Executor etc., Plaintiffs, vs. **J. H. Thayer Martin**, et al., Defendants, in the United States District Court for the District of New Jersey, Equity No. 4805, Now Pending.

United States District Court

DISTRICT OF NEW JERSEY.

EQUITY No. 4805

EDWIN C. NEVIN, Executor of the last will and testament of Walter Ross McShea, dec'd, et als.,

Plaintiffs,

vs.

J. H. THAYER MARTIN, State Tax Commissioner, etc., et als.,

Defendants.

On Bill for Injunction.

On Motion to Dismiss Bill and Dissolve Temporary Order.

BRIEF OF DEFENDANTS

DAVID T. WILENTZ,
Attorney-General of New Jersey,
Attorney for Defendants,

WILLIAM A. MOORE,
Of Special Counsel.

POINT IV

PLAINTIFFS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES IN THE COURTS OF THIS STATE

An adequate administrative (sometimes called "legislative") remedy will always defeat federal jurisdiction:

First National Bank vs. *Weld Co.*, 264 U. S. 450;
Gorham Mfg. Co. vs. *Tax Commission*, 266 U. S. 265;
Porter vs. *Investors Syndicate*, 286 U. S. 461;
Keller vs. *Potomac Electric Company*, 261 U. S. 428;
Prentis vs. *Atlantic Coast Line*, 211 U. S. 210.

A statutory right of review of administrative action, where the reviewing agency may "set aside, modify or confirm" the action below, is an administrative remedy which must be exhausted before resort may be had to a federal equity court.

Porter vs. *Investors Syndicate, supra* (p. 468);
Keller vs. *Potomac Electric Company, supra* (pp. 440, 441).

The mere fact that the reviewing agency may be a court, and may in some respects act judicially, does not destroy its administrative nature for the purposes of the present inquiry.

Porter vs. *Investors Syndicate*, 287 U. S. 346, 347;
First National Bank of Greenville vs. *Gildart, supra* (p. 874).

It is only where the remedy is purely judicial that it need not be pursued.

First National Bank of Greenville vs. *Gildart, supra* (p. 875).

Nor is it material that the proceeding may be by suit in equity instead of by appeal from the administrative order.

Porter vs. *Investors Syndicate, supra* (p. 468).

The character of the proceeding, and therefore the nature of the review, whether administrative or judicial, is determined by the substance and intent of the proceeding and not by its name.

Federal Radio Commission vs. *Nelson Bros. Co.*, 289 U. S. 266, 277.

It makes no difference that the reviewing agency may be a court which in other proceedings acts judicially. If the reviewing court takes the case on the transcript of the proceedings below, and has the power to "modify, alter or revise" the findings below, it is acting administratively and not judicially.

Kansas City Southern Ry. Co. vs. *Cornish*, 65 Fed. (2d) 671, 672.

Such a court is simply "a superior and revising agency" in the administrative field, and, consequently, its decisions are not judicial judgments.

Radio Commission vs. *General Electric Company*, 281 U. S. 464, 467.

A court acquiring jurisdiction by appeal pursuant to statute may be just as much an administrative agency in character as the original administrative body.

Radio Commission vs. *General Electric Company, supra* (pp. 467, 468).

Whether a court on appeal is acting administratively or judicially is fully considered and the test for determining its character in such matters is set forth by the United States Supreme Court in its consideration of the case of *Radio Commission* vs. *General Electric, supra,* and the later case of *Radio Commission* vs. *Nelson Bros. Co., supra.* The Supreme Court in the first of these cases, in passing upon the nature of the reviewing agencies and in determining that such agencies acting in an appellate capacity were administrative and not judicial, based its decision upon the fact that the appeals were taken on the transcript of the proceedings before the original administrative body and that the court was authorized to alter or revise the decision appealed from and enter such judgment as it might deem just. In other words, that its review was not confined to a consideration of matters of law, but as well extended to matters of fact. In the second case, arising after the act had been amended to limit the reviewing courts' power to a consideration of questions of law, and to include a provision that findings of fact by the administrative body should be conclusive on the appeal if supported by substantial evidence, the Supreme Court held the proceeding to be judicial rather than administrative. A reading of these two cases clearly establishes the fact that the question of whether a review is administrative or judicial depends upon whether such review is confined to matters of law or whether it extends to an examination of all phases of the case, including questions of fact, and whether the

reviewing agency may not only affirm or set aside the order appealed from, but as well may modify, alter or revise it.

It is defendants' contention that under Section 18 of the statute (set forth at length in the bill of complaint, p. 11) plaintiffs have a right of appeal to the ordinary for the review of the State Tax Commissioner's determination, and that such review, tested by the rules established in the cases hereinbefore cited, and particularly the last two mentioned, is purely administrative and not judicial.

A right of appeal similar in nature provided by the Missouri Inheritance Tax Act has been held by the United States District Court (W. D. Missouri), and affirmed by the United States Supreme Court on appeal, to afford such an adequate administrative remedy as must be exhausted before resorting to a federal equity court.

> *DePauw University* vs. *Brunk, Treas.*, 53 Fed. (2d) 647, 652, 653; aff'd 285 U. S. 527.

The *per curiam* of the Supreme Court in the *DePauw University Case* affirmed the order below on the ground that there was no jurisdiction in equity and the cases cited, particularly the first two, clearly establish that lack of equity jurisdiction was due to the fact that there was a failure on the part of the taxpayer to exhaust administrative remedies. It might be observed that the review held to be administrative and not judicial was by appeal from the probate court to the circuit court.

It is defendants' claim that the legislature of this state has provided a complete plan for the assessment and collection of inheritance taxes. This plan does not stop with the State Tax Commissioner—the original administrative officer—but extends to the Ordinary, or Prerogative Court, which is constituted a "superior or revising agency." The right of appeal afforded by section 18 of the statute is just

as much a part of the administrative plan and is just as much in the administrative field as the original administrative officer.

The courts of this state have held that the reviewing court (Prerogative) designated by section 18 of the statute is a "legislative agent," or "legislative agency."

> *In re Roebling's Estate*, 91 N. J. Eq., 72, 75, 108 Atl. 359;
> *Bugbee* vs. *Van Cleve*, 99 N. J. Eq. 825, 835, 134 Atl. 646;

which, incidentally, is a binding interpretation on the federal courts.

> *Porter* vs. *Investors Syndicate, supra* (p. 347).

Ordinary Walker in *Bugbee* vs. *Van Cleve, supra*, citing as authority *In re Roebling's Estate, supra*, says (p. 835):

> "* * * Therefore on the authority both of this court and the Court of Errors and Appeals, the proceeding before me is one in the Prerogative Court. Although that court acts in the given case as a *legislative agent*, and the judge thereof is a statutory magistrate."
> (Italics, defendants'.)

Under section 20 the Ordinary is empowered to hear and determine all matters arising under the act. He is not limited to questions of valuation and the amount of the tax, but may also pass upon the question of liability to the tax.

> *In re Budell*, 100 N. J. Eq. 273, 274, 275, 134 Atl. 552.

Appeals to the Prerogative Court are heard on the transcript of the record before the State Tax Commissioner;

In re Pierce's Estate, 89 N. J. Eq. 171, 172, 104 Atl. 298;
In re Bottomley, 92 N. J. Eq. 202, 203, 111 Atl. 605;

and it is the well established practice of that court not only to affirm or set aside the assessment, but to modify, alter or revise it if that course be deemed necessary. For cases of modification see:

In re Moore, 104 N. J. Eq. 400, 145 Atl. 727;
In re Russell, 104 N. J. Eq. 578, 146 Atl. 361;
In re Gould's Estate, 8 N. J. Misc. R. 798, 151 Atl. 743; (affirming the assessment "as corrected by decree of the Vice-Ordinary" reported in 105 N. J. Eq. 598, 148 Atl. 731);
In re O'Neill, 111 N. J. Eq. 378, 162 Atl. 425;
In re Roebling's Estate, 89 N. J. Eq. 163, 104 Atl. 295.

The review by the Prerogative Court afforded plaintiffs by the New Jersey statute appears to be no different than those held to be administrative and not judicial in cases such as:

Radio Comm. vs. *General Electric Co., supra;*
Keller vs. *Potomac Electric Co., supra;*
Porter vs. *Investors Syndicate, supra;*
DePauw University vs. *Brunk, Treas., supra.*

Neither the rule that the burden of proof on such a review is upon the appellant to show clearly wherein the assessment is erroneous,

In re Pierce's Estate, supra (p. 172);
In re Moore, supra (p. 400);

nor the rule that the case will be remanded to the tax commissioner if an attempt is made to introduce new evidence on the appeal,

In re Pierce's Estate, supra (p. 172),

can affect the administrative nature of the proceeding.

Keller vs. *Potomac Electric Co., supra* (p. 440).

And it is not for this court to assume, merely because of the constitutional division of government into three branches: Legislative, Administrative and Judicial (Art. III, N. J. Const.) that the Prerogative Court may not exercise administrative functions ancillary to its judicial duties. The construction of such a constitutional provision is primarily for the state courts; the federal courts being reluctant to pass upon the question. So that, in the absence of decisions of the state courts definitely holding that such powers may not be exercised by a judicial body, federal courts will not assume such to be the fact,

Porter vs. *Investors Syndicate, supra,*

and defendants know of no case in New Jersey precluding the exercise by the Prerogative Court of administrative functions ancillary to its judicial duties.

It is respectfully submitted that the right of review by the Prerogative Court is simply a rounding-out of the entire legislative or administrative scheme for the assessment and collection of inheritance taxes, and is such an administrative remedy as must be exhausted by plaintiffs before they may resort to a federal court.

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IN THE

Supreme Court of the United States

No. 194. **October Term, 1935.**

ETHEL M. DORRANCE, GEORGE MORRIS DORRANCE, M. D., ARTHUR C. DORRANCE and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of the Last Will and Testament of JOHN T. DORRANCE, Deceased,

Appellants,

v.

J. H. THAYER MARTIN, State Tax Commissioner of the State of New Jersey; WILLIAM D. KELLY, State Supervisor, Inheritance Tax Bureau, of the State of New Jersey; FRANK J. MURRAY, Comptroller of the State of New Jersey; WILLIAM H. ALBRIGHT, State Treasurer of the State of New Jersey; and DAVID T. WILENTZ, Attorney General of the State of New Jersey,

Appellees.

Brief Contra Motion to Dismiss.

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